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STRICT LIABILITY FOR AIRCRAFT CRASHES AND FORCED LANDINGS ON GROUND VICTIMS OUTSIDE OF ESTABLISHED LANDING AREAS.

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Strict liability is imposed upon operators of aircraft for damage by crashes and forced landings on ground victims outside of established landing areas. That is common law as it is, applied to the facts of air traffic as they are, unmodified by special statute.

As an exclusive criterion of strict liability the single term "extra-hazardous" or "ultrahazardous" is much too narrow to reflect the basic realities accurately. Other basic reasons often are involved. This is readily apparent even on a hasty and incomplete survey of the representative authorities that are discussed in Part I of this paper.

I.

Typical Basic Features Which at Common Law on the Merits Point Toward Strict Liability for Activity Are One-Sidedness, Extrahazardousness and Distributability of Losses to Those Who Benefit.

At least three distinctive features in common law tort materials strongly tend to show whether negligence or strict liability is properly to be applied in novel situations. They are as follows: (1) One-sidedness of an activity with regard to receipt of benefits that accrue in creation of risks to others in the type of activity points toward strict liability as the applicable law. Mutuality in these respects, on the other hand, points toward negligence as the applicable law. (2) Inherently great danger to others in the type of activity in question points toward strict liability. (3) Ability of the type of enterprise which caused the damage to distribute the loss as part of its costs to those who receive its benefits points toward strict liability. This third feature may be loosely sloganized by the word "insurability."

The presence of all three of these distinctive features in a particular fact combination strongly favors the application of strict liability as *prima facie* the controlling legal principle. Some examples of each of these three features are the following:

1. *One-sidedness of an Activity with Regard to Receipt of Benefits and Creation of Risks to Others Points Toward Strict Liability; Mutuality in These Respects Points Toward Negligence as the Applicable Law.*

Mutuality in receipt of benefits and in creation of risks to others in the type of activity in question is readily recognized in many familiar situations where as a matter of course the law of negligence is applied.

Collisions on highways afford a most conspicuous type of illustration of such mutuality in receipt of benefits and in creation of risks to others. Each user of the highway receives the direct advantage of such use at the time. The presence and conduct of each at the time increases the risk of harm to the other in the use of the highway. Where collisions occur between users of the common highway, the law of negligence is ordinarily applied as a matter of course, whether the collision occurs on land,¹ at sea,² or in the air.³

Mutuality in receipt of benefits and in creation of risks to others is readily illustrated also in many familiar relations of land occupier and business visitor. Here, too, the law of negligence is ordinarily applied as a matter of course. The occupier on his part is required to use reasonable care, either to make reasonably safe or to give adequate warning with respect to dangerous natural or artificial conditions known or reasonably discoverable by him where he has no reason to believe they will be discovered or realized by the business visitor.⁴ In cases of this type, it is obvious upon reflection that the benefits of the business visitor relation are mutual to both occupier and business visitor. It is also clear that the conduct of each can create additional risks to the other.

Mutuality in receipt of benefits and in creation of risks to others is also readily noticed in the relations between occupier of land and users of the adjoining public highway. Here, too, each enjoys the benefits and each creates certain risks. Here, too, the law of negligence is ordinarily applied as a matter of course. The occupier must use reasonable care with respect

¹For illustrations from such collisions on land, see *Vincent v. Stinehour*, 7 Vt. 62 (1835) (horse-drawn vehicle and pedestrian on the road); *Joslin v. Grand Rapids Ice & Coal Co.*, 53 Mich. 322, 19 N.W. 17 (1884) (horsedrawn vehicles in use on common highway); *Saterlee v. Orange Glenn School District*, 29 Cal.2d 581, 177 P.2d 279 (1947) (school bus and private automobile at highway intersection); *Smith v. City & County of San Francisco*, — Cal.App. —, 257 P.2d 999 (1953) (bus and pedestrian at street intersection); *Shouten v. Crawford*, — Cal.App. —, 257 P.2d 88 (1953) (two automobiles at street intersection).

²For illustrations from such collisions at sea, see *The Hindoo*, 74 F.Supp. 145 (S.D. N.Y. 1947) (two merchant vessels); *Petrich v. Hanson*, 204 F.2d 261 (9th Cir. 1953) (two tuna fishing vessels); *Det Forenede Dampskibs-selskab, A/S v. The Excalibur*, 112 F.Supp. 205 (E.D. N.Y. 1953).

³For illustrations from such collisions in the air, see *Herrick v. Curtiss Flying Service*, 1932 U.S.Av.R. 110 (State of New York, Supreme Court, Nassau County) (damages sought for injury to persons and planes involved in mid-air collision. In its charge to the jury the court said, at p. 123: "The supreme rule on the air, as the supreme rule of the road, is the rule of *mutual forbearance*" (emphasis supplied)); *Ebrite v. Crawford*, 215 Cal. 724, 12 P.2d 937 (1932) (damages sought for injury to persons and plane involved in mid-air collision); *Smith v. O'Donnell*, 215 Cal. 714, 12 P.2d 933 (1932) (damages sought for injury to passenger involved in mid-air collision); *Parker v. Granger*, 4 Cal.2d 668, 52 P.2d 226 (1936) (damages sought for death of employees and contractors aboard who were killed as result of mid-air collision); *Eastern Air Lines v. United States*, 110 F.Supp. 491 (D. Del. 1952) (damages recovered for destruction of plane caused by mid-air collision).

⁴RESTATEMENT, TORTS § 343 (1934); *Johnston v. Long*, 30 Cal.2d 54, 181 P.2d 645 (1947) (automobile agency garage); *Johnston v. De La Guerra Properties*, 28 Cal.2d 394, 170 P.2d 5 (1946) (restaurant).

to creation or maintenance of artificial conditions endangering the highway users.⁵ The user of the public highway must on his part use reasonable care to avoid intruding on the adjoining land.⁶

On the other hand, one-sidedness in receipt of benefits and in creation of risks to others is conspicuously illustrated in the use of high explosives. In this type of activity strict liability is often held applicable.⁷

One-sidedness in receipt of benefits and in creation of risks to others is also readily recognized in other conspicuous instances where strict liability has been applied.⁸

2. Extrahazardous Nature of an Activity Points Toward Strict Liability.

Under the Restatement of Torts, strict liability is imposed upon one who carries on ultrahazardous activities.⁹ Under the Restatement of Torts, activity is said to be extrahazardous if it "(a) necessarily involves a risk of serious harm to the person, land or chattels of others which cannot be eliminated by

⁵RESTATEMENT, TORTS §§ 364 and 368 (1934); *Potter v. Empress Theatre Co.*, 71 Cal.App.2d 4, 204 P.2d 120 (1949) (theatre marquee falling on user of sidewalk).

⁶See, for instance, RESTATEMENT, TORTS § 505 (1934) (livestock driven on highway straying therefrom); *Tillett v. Ward*, L.R. 10 Q.B. 17 (1882) (no liability to shop owner whose shop was entered by a cow which was driven along the street with reasonable care); PROSSER, TORTS § 435 (1941) and cases cited.

⁷See, *Exner v. Sherman Power Construction Co.*, 54 F.2d 510 (2d Cir. 1931), 80 A.L.R. 686 (explosion of dynamite stored in inhabited area). At p. 513, the court cites a large number of cases in support of the statement that "in the so-called 'blasting' cases an absolute liability, without regard to fault, has uniformly been imposed by the American courts wherever there has been an actual invasion of property by rocks or debris"; *Heeg v. Licht*, 80 N.Y. 579, 36 Am.Rep. 654 (1880) (explosion of powder magazine in inhabited area); *Whitman Hotel Corporation v. Elliott & Watrous Eng. Co.*, 137 Conn. 562, 79 A.2d 591 (1951) (damage to plaintiff's hotel caused by ground vibration from defendant's dynamite blasting operations within a few hundred feet); *Federoff v. Harrison Construction Co.*, 362 Pa. 181, 66 A.2d 817 (1949) (damage to plaintiff's house caused by vibration or concussion from defendant's blasting operations held to come within § 519 of the Restatement of Torts; recovery not dependent on proof of negligence); *Alonzo v. Hills*, 95 Cal.App.2d 778, 214 P.2d 50 (1950) ("blasting in populated surroundings, in the vicinity of dwelling places or places of business is considered an ultrahazardous activity for the miscarriage of which the actor is held strictly liable in damages regardless of the degree of care with which the blasting is performed." *Nourse, Presiding Justice*, at p. 54. Blasting was in a quarry about 200 yards from plaintiff's dwelling house in a community of 300 homes. Plaintiff's house was damaged through earth-shaking concussion and vibration. A rock destroyed a bench on plaintiff's property near which one of his daughters was standing).

⁸See, *Bridgeman-Russell Co. v. City of Duluth*, 158 Minn. 509, 197 N.W. 971 (1924) (break in 20-inch water main in defendant's water system which included a reservoir 200 feet above plaintiff's buildings containing 14 million gallons of water with pressure in the main of 12,000 pounds to the square foot); *Ure v. United States*, 93 F.Supp. 799 (D. Ore. 1950) (break in large irrigation canal carrying a volume of water far beyond capacity of local streams and under tremendous pressure and flooding nearby lands); *Luthringer v. Moore*, 31 Cal.2d 489, 190 P.2d 1 (1948) (illness of plaintiff caused by defendant's operations of pest control fumigation involving use of known highly volatile and penetrating deadly gas).

⁹§ 519.

the exercise of utmost care, and (b) is not a matter of common usage."¹⁰

Under the Restatement of Torts, aviation in its present stage of development is treated as ultrahazardous with respect to persons, structures and chattels on the land over which the flight is made.¹¹ Under the Restatement of Torts, blasting with high explosives is recognized as ultrahazardous, as are storage and transportation of explosive substances.¹² Common law authorities on blasting are in this memorandum cited above in connection with the feature of one-sidedness.¹³ The drilling of oil wells is similarly classified in the Restatement of Torts, with respect to the chance of striking a gusher of such high pressure that it will do serious harm to lower lands in the vicinity.¹⁴ This Restatement position on oil wells in effect codifies the result reached in the California case of *Green v. General Petroleum Corporation*,¹⁵ which was decided a few years before the Restatement language on the point became available.

These sections of the Restatement of Torts have been quoted approvingly and relied upon by the Supreme Court of California.¹⁶

It may be added that under other language of the Restatement of Torts,

¹⁰§ 520.

In comment *e* to § 520, it is stated that "An activity is a matter of common usage if it is customarily carried on by the great mass of mankind or by many people in the community." In comment *g* to § 520, it is stated that "On the other hand, even those activities or instrumentalities which cannot be made safe by the utmost precaution and care may be carried on or used without incurring absolute liability, if the activity or instrumentality is one which is commonly carried on or used." After this statement this comment proceeds to contrast automobile traffic with air traffic with respect to the applicable basis for liability.

In this connection any one who cares to notice may recognize that the "common usage" which precludes the activity from being classified as ultrahazardous under the wording of § 520(b) has nothing to do with reducing the actual danger involved. Literally, under the Restatement language of this section, if one person engages in the activity designated as ultrahazardous strict liability applies. If a great many in the community engage in that identical activity or use the identical type of instrumentalities strict liability is no longer applicable. Obviously, though the Restatement comments do not directly point out this distinction, the activity under such circumstances has lost its one-sidedness with respect to receipt of advantage therefrom and creation of risks to others thereby. Where only one, or only a few, engage in that dangerous activity, such one-sidedness is conspicuous. When everybody, or a great many people in the community, are doing it, mutuality in receipt of advantages therefrom and in creation of risks to others thereby has replaced the erstwhile one-sidedness.

The distinction in result made by § 520 of the Restatement of Torts, as between subsection (a) and subsection (b), thus actually exemplifies the basic distinction between one-sidedness and mutuality in these respects which is emphasized in this paper.

¹¹§ 520, comment *b*, *d*, and *g*.

¹²§ 520, comment *c*.

¹³See note 7 *supra*.

¹⁴§ 520, comment *c*.

¹⁵205 Cal. 328, 270 P. 952 (1928).

¹⁶See, *Luthringer v. Moore*, 31 Cal.2d 489, 190 P.2d 1 (1948) (strict liability for illness caused by operations of pest control fumigation involving use of known highly volatile and penetrating deadly gas).

strict liability is not applicable in favor of those who themselves are harmed while participating in ultrahazardous activities.¹⁷

These defenses under Restatement of Torts, section 523, to the prima facie strict liability under sections 519 and 520, do not by their terms extend to injury done to persons or property on the ground by crashes or forced landings outside of established landing areas where these outside victims are not in the aviation activities.

In these respects these sections of the Restatement of Torts roughly parallel the now available judicial materials in aviation cases. These judicial materials apply the law of negligence, including the doctrines of *res ipsa loquitur*, in connection with claims of participants in aviation activities, whether employees, passengers or persons concerned in other activities at airports.¹⁸

For injury to persons or property on the ground by crashes or forced landings outside of established landing areas, however, the common law judicial materials hold the aircraft operator subject to strict liability.¹⁹

3. Ability of the Type of Enterprise to Distribute the Loss Through Insurance or Otherwise as Part of Its Costs to Those Who Receive Its Benefits Points Toward Strict Liability.

Ability of the type of enterprise to distribute the loss through insurance or otherwise to those who get the benefit is a pertinent factor in determining on the merits who ought to bear the risk. This has often been recognized both in authoritative juristic writings and in judicial decisions. It seems appropriate in this paper to let this point be indicated in the very words of such authorities themselves.

¹⁷§ 523 and comments.

Comment *b* rests this position on the basic reason of assumption of the risk which is inseparable from the activity. Comment *c* applies this to one who takes part in the ultrahazardous activity as a servant, as a member of a group carrying it on, as an actor in a joint enterprise, or as the employer of an independent contractor employed to carry it on or to do work which necessarily involves it. Comment *d* applies this to gratuitous licensees at airports. Comment *e* applies this to gratuitous passengers of private aviators. Comment *f* applies this to common carrier airline passengers.

¹⁸See, for instance, *Ebrite v. Crawford*, 215 Cal. 724, 12 P.2d 937 (1932) (damages sought for injury to persons and plane involved in mid-air collision); *Smith v. O'Donnell*, 215 Cal. 714, 12 P.2d 933 (1932) (damages sought for injury to passenger involved in mid-air collision); *Parker v. Granger*, 4 Cal.2d 668, 52 P.2d 226 (1936) (damages sought for death of employees and contractors aboard who were killed as result of mid-air collision); *Allison v. Standard Air Lines*, 65 F.2d 668 (9th Cir. 1933) (damages sought for death of airline passengers killed in crash into a mountain); *Birkhead v. Sammon*, 171 Md. 178, 189 Atl. 265 (1937) (plane in landing at airport during an air circus program struck a bicycle rider on the landing field); *Prikop v. Becker*, 345 Pa. 607, 29 A.2d 23 (1942) (a 13-year-old junior high school boy struck by landing plane at edge of private air field). Compare, *Johnson v. Central Aviation Corporation*, 103 Cal.App.2d 102, 229 P.2d 114 (1951) (student pilot's collision with another plane at airport while negligently taxiing before checking out, held not imputable to the flying school, such pilot in ordinary course of training not being the school's servant or agent, so as to make the rule of respondeat superior applicable).

¹⁹See authorities listed in note 33 *infra* with accompanying text.

(a) Juristic Writings Have Recognized This Principle.

A few such selections from relatively recent juristic writings are the following:

"There is a strong and growing tendency, where there is no blame on either side, to ask, in view of the exigencies of social justice, who can best bear the loss."²⁰

"A . . . reason for imposing such liabilities is sometimes advanced that a utility or a manufacturer or producer upon whom liability is cast may pass the loss on to the public-at-large in charge for services or in the price charged for products."²¹

"The unspecialized consumer has neither skill nor means of testing the wares before use. He buys and uses, he must buy and use, at hazard of his skin. . . . What is wanted is to protect the consumer dependent on a producer who is a stranger or even anonymous. That needed protection is to shift the immediate incidence of the hazard of life in an industrial society away from the individual over to a group which can distribute the loss; and to place the loss where the most pressure will be exerted to keep down future losses."²²

"There may be a social advantage in shifting a loss from one carrying on a particular industry to the consumers of the products of that industry, or from one individual to a large number of persons, and, therefore, quite apart from any question of fault, liability may be imposed upon those responsible for particular activities. This is, no doubt, partly the reason for the imposition of liability without fault in the Workmen's Compensation Act."²³

"In the era of large scale enterprise combined with modern insurance, however, it is normally possible for activities to bear the losses which can reasonably be anticipated as a consequence of their being carried on, without disastrous results. Reserves may be set aside, based on past experience, or liability insurance may be obtained, and the cost covered by the price charged for the goods or services supplied. If absolute liability is imposed on such activities, then, ultimately those who enjoy the goods and services will pay for the losses which result from making them available."²⁴

"The extra cost of paying these claims will not all be cast on the individuals who nominally incur them, but will be distributed over the whole group of policy holders carrying insurance on this type of risk."²⁵

"A truer and more useful appraisal of the interests and policies in a decision will result from thinking through its implications in terms of distribution of losses through insurance rather than proceeding on the false and

²⁰POUND, *THE SPIRIT OF THE COMMON LAW* 189 (1921).

²¹Pound, *Law in the Service State*, 36 A.B.A.J. 977, 981 (1950) (This article warns against abuse of this viewpoint under conditions of control by an official bureaucracy).

²²LLEWELLYN, *CASES AND MATERIALS ON SALES* 341 (1930).

²³Carpenter, *The Doctrine of Green v. General Petroleum Corporation*, 5 So. CALIF. L. REV. 263, 271 (1932).

²⁴James, *Absolute Liability for Ultrahazardous Activities: An Appraisal of the Restatement Doctrine*, 37 CALIF. L. REV. 269, 275 (1949).

²⁵James, *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 YALE L.J. 549, 552 (1948).

misleading assumption that the individual defendant pays the damages, when in so many cases he does not."²⁶

(b) Judicial Opinions Have Recognized This Principle.

A few such selections from relatively recent judicial opinions are the following:

"The principal justification for the application of the doctrine of respondeat superior in any case is the fact that the employer may spread the risk through insurance and carry the cost thereof as part of his costs of doing business. See, *Smith, Frolic and Detour*, 23 Col. L.R. 444, 456 et seq."²⁷

"In my opinion it should now be recognized that a manufacturer incurs an absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings. . . . The cost of an injury and the loss of time and health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business. It is to the public interest to discourage the marketing of products having defects that are a menace to the public. If such products, nevertheless, find their way into the market, it is to the public interest to place the responsibility for whatever injury they may cause, upon the manufacturer, who, even if he is not negligent in the manufacture of the product, is responsible for its reaching the market. However intermittently such injuries may occur, and however haphazardly they may strike, the risk of their occurrence is a constant risk and a general one. Against such a risk there should be a general and constant protection and the manufacturer is best situated to afford such protection.

"The injury from a defective product does not become a matter of indifference because the defect arises from causes other than negligence of the manufacturer. . . ."²⁸

The late Justice Wiley Rutledge, while still on the United States Court of Appeals for the District of Columbia, delivered an opinion in which he carefully analyzed the controversial question of the liability of charitable corporations, such as colleges or hospitals, for torts of their employees or agents. After discussing and minimizing the asserted danger of dissipation of assets and deterrence of donations by such liabilities, Justice Rutledge continued as follows:

"Further, if there is danger of dissipation, insurance is now available to guard against it and prudent management will provide the protection. . . . While insurance should not, perhaps, be made a criterion of responsibility, its prevalence and low costs are important considerations in evaluating the fears, or supposed ones of dissipation or deterrence. What is at stake, so

²⁶*Id.* at 553.

²⁷Traynor, Justice, in *Johnston v. Long*, 30 Cal.2d 54, 55, 181 P.2d 645, 651 (1947). (principal without fault liable for tort of his employee within the scope of the business).

²⁸Traynor, Justice, concurring, in *Escola v. Coca Cola Bottling Co.*, of Fresno, 24 Cal. 2d 453, 462, 150 P.2d 436, 441 (1944).

far as the charity is concerned, is the cost of reasonable protection, the amount of the insurance premium as an added burden on its finances, not the awarding over in damages of its entire assets.

"Against this, we weigh the cost to the victim of bearing the full burden of his injury. In line with this view, may be mentioned the general extensions of Workmen's Compensation acts and Social Security legislation to include the employees of charitable institutions. Also, as some of the more recent cases point out, much of modern charity or philanthropy is 'big business' in its field. It, therefore, has capacity for absorption of loss which did not exist in the typical Nineteenth Century small hospital or college."²⁹

"Congestion of population in large cities is on the increase. This calls for water systems on a vast scale either by the cities themselves or by strong corporations. Water in immense quantities must be accumulated and held where none of it existed before. If a break occurs in the reservoir itself, or in the principal main, the flood may utterly ruin the individual financially. In such a case, even though negligence be absent, natural justice would seem to demand that the enterprise, or what really is the same thing, the whole community benefited by the enterprise, should stand the loss rather than the individual. It is too heavy a burden upon one."³⁰

"The dangerous enterprise must 'pay its way'. . . ."³¹

"Important as the continued development of aviation is believed to be, no convincing reason has been presented why it should be subsidized at the expense of the luckless victim on the ground who, without participating in aviation in any way, is injured by an aircraft accident even though not attributable to the fault of the operator."³²

II.

Aircraft Operators Are Subject to Strict Liability for Damage to Ground Victims Outside of Established Landing Areas.

1. Far Reaching General Importance of the Question of Strict Liability for Plane Crashes on Ground Surface Victims Outside of Airports Is Found in That It Affects All of Us Who Live and Work on the Ground Outside of Established Landing Areas.

Whether or not strict liability is applicable for plane crashes and forced landings upon ground surface victims outside of airports is one of very far

²⁹Rutledge, Justice, in *President & Directors of Georgetown College v. Hughes*, 130 F.2d 810, 823-824 (D.C. Cir. 1942).

³⁰Holt, Justice, in *Bridgeman-Russell Co. v. City of Duluth*, 158 Minn. 509, 511, 197 N.W. 971, 972 (1924).

³¹Peek, Justice, in *Luthringer v. Moore*, 80 A.C.A. 123, 181 P.2d 89, 96 (1947).

In 25 A.L.R.2d 29, 58 (1952), as quoted with approval by Hamley, Justice, in *Pierce v. Yakima Valley Memorial Hospital Ass'n.*, — Wash. —, 260 P.2d 765, 771-772 (1953) appears the following: "The modern tendency of the law is to shift the burden from the innocent victim to the community at large, and to distribute losses incurred by individuals through the operation of an enterprise among all who benefit by it rather than to leave them wholly to be borne by those who have sustained them."

³²Hartshorne, District Judge, in *Prentiss v. National Airlines*, 112 F.Supp. 306, 312 (D. N.J. 1953) quoting with approval from *Edward C. Sweeney*, 19 J. AIR L. 324 (1952).

reaching general importance, not only to the aviation industry but also to the entire public of potential victims. These potential victims include all of us as occupiers on the ground surface outside of established landing areas. It is now common knowledge that under present day conditions of air traffic in California, all of us, as the public of individuals on the ground surface outside of established landing areas, are exposed to the chances of crashes and forced landings from air traffic with which we have no direct connection. It is common knowledge, too, that now and then from time to time such crashes or forced landings upon outside ground surface victims do happen.

This risk of personal disaster from overhead air traffic with which we have no direct connection is very real. All of us who live and earn our living on the ground surface outside of established landing areas are continually exposed to this risk. True, as air traffic goes, the chances that such crashes on outsiders will happen to any particular victim are not very great. Though mathematically this risk may not be very great, when such a crash or forced landing does happen, the damage to the individual victim in the instance can be disastrous. Yesterday, as it were, some stranger to you became the chance victim of such a crash from overhead air traffic with which he had no connection. Tomorrow, for all any one can tell, the chance crash or forced landing may strike you or me. This question therefore concerns all of us as potential victims.

2. The Common Law Authorities Here Directly Impose Strict Liability.

At common law the operator of an airplane is subject to strict liability for crashes and forced landings causing injury to person or property upon the ground outside of established landing areas.

As stated by the court in the leading case on the subject:

“Such chance as there may be that a properly equipped and well-handled aeroplane may still crash upon and injure private property shall be borne by him who takes the machine aloft.”³³

³³Rochester Gas & Electric Co. v. Dunlop, 148 Misc. 849, 266 N.Y.Supp. 469 (1933) (carefully operated plane attempting forced landing away from airport crashed against electric transmission line tower).

To substantially the same effect, see *D'Anna v. United States*, 181 F.2d 335, 337 (4th Cir. 1950) (dictum by Parker, J.) (tank torn from plane in diving operation over city, fell on plaintiff; common law in Maryland modified by local statute); *Guille v. Swan*, 19 Johns. 381 (N.Y. 1822) (balloon); *Parcell v. United States*, 104 F.Supp. 110, 116 (S.D. W.Va. 1951) (recovery for crash on house expressly rested both on *res ipsa loquitur* and on strict liability); *United States v. Gaidys*, 194 F.2d 762 (10th Cir. 1952) (crash by low flying Air Force jet plane on plaintiff's house; treated as trespass, *res ipsa loquitur* not being applicable); *Prentiss v. National Airlines*, 112 F.Supp. 306, 311, 312 (D. N.J. 1953) (dictum) (airline passenger plane crashed on persons and houses in neighborhood of airport; the case itself is decided under the Uniform Aeronautics Act); *RESTATEMENT, TORTS* § 520, comment *b* and *d* (1934). See, generally, Bohlen, *Aviation Under the Common Law*, 48 HARV. L. REV. 216 (1934).

In *Kirchner v. Jones & White*, 1932 U.S.Av.R. 278 in a New Jersey trial court, a substantial

3. *The California Statute Points the Same Way.*

Under the California statute the *owner* or *lessee* or the *operator* of aircraft can be held liable "as provided by law" for damages caused by a forced landing.³⁴

4. *The Restatement of Torts Here Imposes Strict Liability.*

Under the language of the Restatement of Torts relating to extra-hazardous activity, the operator of an airplane is subject to strict liability for

jury verdict for the plaintiff was found where airplane crashed into his house. The brief report of the case does not go into the explanation of the basis on which the liability was found. In *Prentiss v. National Airlines*, 112 F.Supp. 306, 314 (D. N.J. 1953) the *Kirchner* case is referred to with approval as resting upon strict liability, and as showing that the New Jersey trial court there struck out defenses which were negated by the Uniform Aeronautics Act in force in New Jersey.

It may be added that as a matter of course under the familiar rule of respondeat superior the aircraft operator's principal is liable, as well as the operator himself, where the aircraft is operated by an employee or agent in the course of the employment. This is illustrated vividly but without separate comment on this point in *Prentiss v. National Airlines*, *supra* (airline passenger plane crashed on persons and houses in neighborhood of airport).

³⁴Cal.Stat. 1947, c. 1379, § 2(d), p. 2927 (Deering's General Laws, Act 151(a)). The language of the California statute on this point is as follows:

"It is further declared that flight in aircraft over the lands and waters of this State is lawful, unless at altitudes below those prescribed by federal authority, or unless so conducted as to be imminently dangerous to persons or property lawfully on the land or water beneath. The landing of an aircraft on the lands or waters of another, without his consent, is unlawful except in the case of a forced landing. For damages caused by a forced landing, the owner or lessee of the aircraft or the operator thereof shall be liable, as provided by law."

In ruling on a motion for nonsuit made by Defendant *Lenerville*, in the case of *Boyd v. White*, No. 77860, in the Superior Court for the County of Santa Clara, on July 30, 1953, the Hon. John D. Foley, Judge, expressed his opinion of this section of the California statute. On this point, pp. 113-115 of the Reporter's Transcript shows the following:

"It seems to me that this case comes within the rule stated in the Restatement of Torts as to an ultrahazardous activity.

"I am also somewhat influenced by the statutory law that we find in Act 151(a) of the General Law, subdivision 2, particularly paragraph (d) thereof.

"Now, I think we must agree that the Legislature, when it enacts a statute, has some purpose in mind. I don't think that we can assume that they are performing an idle act, so to speak.

"In that section, or paragraph (d), we find this language:

"For damages caused by a forced landing, the owner or lessee of the aircraft, or the operator thereof, shall be liable, as provided by law."

"Now, either the owner or lessee or operator is or is not liable for damages arising out of a forced landing. If they are liable, then this section doesn't mean anything because it simply says they are liable as provided by law.

"I am of the opinion that this is an attempt, although it is not very clearly expressed, to make the owner, lessee or operator liable for damages arising out of a forced landing, and it may be that the phrase, 'as provided by law', has application not to the word 'liable', but to the word 'damages'. Otherwise, it doesn't seem to me that the statement there means anything. And while the language isn't too clear, it may be an attempt on the part of the Legislature, as far as forced landings are concerned, to fix an absolute liability upon the owner or lessee or the operator of the aircraft.

"However, regardless of that, assuming that 'as provided by law' refers to the question of liability and not to the question of damages, then what does the law provide as far as that liability is concerned? I find no statutory law on it.

"And it seems to me that the rule in the Restatement of Torts should control; it appears to me to be a reasonable rule, and particularly in the light of the statute that we do have in which the Legislature apparently has distinguished the liability of aircraft owners and operators, with respect to the owners of other aircraft, and with respect to passengers in aircraft, as distinguished from the liability of the owner or lessee or operator of an aircraft that does damage to some stranger's property, so to speak, that has no bearing upon aviation as we have in the case here."

crashes and forced landings causing injury to persons or property upon the ground outside of established landing areas.³⁵

Such forced landings also come directly within the language of the Restatement of Torts relating to incomplete privilege by private necessity for intruding on another's land.³⁶

Damage done to personalty by such forced landings also comes within the language of the Restatement of Torts, and the Restatement of Restitution, relating to incomplete privilege by private necessity to use another's chattel for self-protection.³⁷

³⁵§ 519: "Except as stated in secs. 521-4, one who carries on an ultrahazardous activity is liable to another whose person, land or chattels the actor should recognize as likely to be harmed by the unpreventable miscarriage of the activity for harm resulting thereto from that which makes the activity ultrahazardous, although the utmost care is exercised to prevent the harm."

§ 520: "An activity is ultrahazardous if it (a) necessarily involves a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of the utmost care, and (b) is not a matter of common usage. Comment *b* to § 520: ". . . Thus, aviation in its present stage of development is ultrahazardous because even the best constructed and maintained aeroplane is so incapable of complete control that flying creates a risk that the plane even though carefully constructed, maintained, and operated, may crash to the injury of persons, structures and chattels on the land over which the flight is made."

Comment *d* to § 520 reads as follows: ". . . one of the risks of aviation is that the plane being flown at a high altitude and over a large area may encounter dangerous weather conditions which would be altogether abnormal on the surface of the earth. The chance that the aviator will encounter them is one of the risks which make aviation an ultrahazardous activity. . . ."

³⁶§ 197 is as follows:

"(1) One is privileged to enter land other than a dwelling house in the possession of another, at reasonable times and in a reasonable manner, for the purpose of protecting

"(a) any person, including the actor, from death or serious bodily harm, or

"(b) land or chattels from destruction or serious harm,

if such conduct is necessary, or reasonably appears to the actor to be necessary, unless the actor knows that the person for whose benefit the entry is made is unwilling that the actor shall take such protective action.

"(2) Where the entry is for the benefit of the actor, he is subject to liability for any harm done in the exercise of the privilege stated in subsection (1) to any legally protected interest of the possessor in the land or connected therewith, except where the threat of harm to avert which the entry is made is caused by the tortious conduct or contributory negligence of the possessor."

Illustration No. 3, under § 197, reads as follows: "(3) *A*, an aviator, while carefully and skilfully operating his airplane makes a forced landing on *B*'s field in the reasonable belief that it is necessary to do so for the protection of himself and his plane. *A* is not liable for his mere entry, but under the statement in subsection (2) is liable for any harm thereby caused to *B* or to *B*'s buildings, crops or other belongings."

Comment (1) to § 197 reads in part as follows: ". . . The privilege to enter is an incomplete one, in that, although the possessor of the land is not privileged to resist the entry, the actor is subject to liability for all harm to the possessor or to his interest in the land which the actor may cause, whether intentionally, negligently or accidentally, while exercising his privilege."

³⁷§ 263: "PRIVILEGE CREATED BY PRIVATE NECESSITY."

"(1) One is privileged to use or otherwise intentionally intermeddle with a chattel while in possession of another for the purpose of protecting himself, the other, or a third person from death or serious bodily harm, if

"(a) such use or dealing is reasonable in view of the harm which it is intended to prevent as compared with the harm to the chattel likely to result from it, and

"(b) the actor exercises reasonable care to prevent his dealings from causing unnecessary harm to the chattel,

unless the actor knows that the person for whose benefit the intermeddling is made is unwilling that the actor shall take such protective action.

"(2) Where the use or other intermeddling with another's chattel is made for the benefit of the actor, he is subject to liability for any harm caused thereto by the exercise of the privilege

5. *Common Law Salvage Analogies Point the Same Way.*

Damage to personalty caused by the aviator's forced landing upon grounds outside of established landing areas also comes directly within the familiar and now broadly accepted common law analogies concerned with use of another's property for self-protection. Where the emergency reasonably so requires, one person may prudently and advisedly use another's property for the purpose of preserving his own much more valuable interest. In such cases he is bound, however, to pay for the actual damage caused to the other thereby. Justice in such cases is deemed to require that he who thus takes the benefits for himself must also bear the incidental burdens.³⁸

6. *Liability of Aircraft Operators for Such Forced Landings Can Also Be Rested on Negligence If Appearing.*

Liability for crashes and forced landings by airplanes causing injury to persons or property on the ground outside of established landing areas, if

stated in subsection (1) except where the threat of harm to avert which the dealing is made is actually or apparently caused by the conduct of the possessor of the chattel."

RESTATEMENT, TORTS § 263, comment *f* (1934) reads as follows:

"... But where the dealing with another's chattel is made for the purpose of protecting the actor, the privilege is incomplete and the actor is subject to liability for actual harm done to the chattel. Since the actor thus avoids harm to himself in no way threatened by the conduct of the possessor of the chattel, he is not entitled to commandeer the use of the other's goods for his own protection without making good any loss thus caused."

RESTATEMENT, RESTITUTION § 122 (1937) reads as follows:

"BENEFITS DERIVED FROM THE EXERCISE OF INCOMPLETE PRIVILEGE.

"A person who is privileged to harm the land or chattels of another while acting to preserve himself or a third person or to preserve his own things or those of a third person is under a duty of restitution for the amount of harm done, except where

"(a) the harm which he seeks to avert is threatened by the things which he destroys or by the tortious conduct or contributory fault of the owner or possessor, or

"(b) his act reasonably appears to be necessary to avert a public catastrophe, or

"(c) he is exercising his privilege as a member of the public to enter land adjacent to a highway which has become impassable."

RESTATEMENT, RESTITUTION § 122, comment *a* (1937) reads as follows: "*a. Self-protection.* As stated in the Restatement of Torts, secs. 74, 195, 196 and 197, a person is sometimes privileged to protect himself or a third person even though this may result in harm to the property of another. His privilege thus to use another's things is given, not to throw his loss upon the other, but to prevent him from suffering a serious loss which could be mitigated by the use of the other's things. Under such circumstances, if he chooses to protect himself, except as stated in Clauses (a), (b) and (c), he indicates that the value to him of the destruction or use of the other's property is not less than its market value. It is fair therefore that he should pay for them or for their use."

³⁸The leading case on this point is *Vincent v. Lake Erie Transportation Co.*, 109 Minn. 456, 124 N.W. 221 (1910) (vessel owner who, to save his vessel during a violent storm, took active steps to hold the vessel tied to the dock against which it was pounded by the storm, must pay for the damage done to the dock thereby, even though the vessel owner acted prudently throughout). To the same effect, see, *Swan-Finch Oil Corporation v. Warner-Quinlan Co.*, 11 N.J.Misc. 469, 167 Atl. 211 (1933) (defendant-dock-owner to save his own dock from destruction from a moored oil barge, whose oil was set on fire by a stroke of lightning, cut the burning oil barge adrift, thereby letting it drift to plaintiff's dock and set it on fire).

adequate proof of negligence appears in the facts, of course, can also be rested on the basis of negligence.³⁹

7. Forced Landings with Resulting Damage Have Been Classed as in the Nature of Trespass.

The crashing of an airplane in flight on the property on the ground below outside of established landing areas, with resulting damage, has been held to amount to a wrong in the nature of trespass.⁴⁰

8. Legal Responsibility for Conduct Which Is Subject to Strict Liability Cannot Be Avoided Through Use of Independent Contractors.

Where the defendant arranges for flying activity that is subject to strict liability, the defendant's responsibility for it cannot be avoided through procuring it to be done by an independent contractor.⁴¹

Professor Bohlen, the principal draftsman of the Restatement of Torts, on this point expressed his views as follows:

"It is submitted, however, that the tendency, so strongly marked in the later English cases, to forbid one indulging in a dangerous activity to relieve himself from liability by turning the whole matter over to an independent

³⁹In various cases of this sort evidence of negligence has been affirmatively made out. *Evans v. United States*, 100 F.Supp. 5 (W.D. La. 1951) (crash in cotton field, killing several cotton pickers); *Kadylak v. O'Brien*, 32 F.Supp. 281 (W.D. Pa. 1940) (forced landing on a creek, striking and killing a boy swimming there); *Livingston v. Flaherty* (Superior Court, Los Angeles County 1932) described at length in 4 J. Air L. 524, 525 (1933) (negligently attempted landing at night on unknown terrain in desert struck and killed farmer holding lantern).

In various cases in certain jurisdictions airplane crashes and forced landings under given conditions have been regarded as bringing the doctrine of *res ipsa loquitur* into application. *N.W. Nat. Ins. Co. v. United States*, 1949 U.S.Av.R. 316 (crash on plaintiff's house, set it on fire); *United States v. Kesinger*, 190 F.2d 529 (10th Cir. 1951) (crash on plaintiff's barn and milkhouse—*res ipsa loquitur* being found applicable under the special facts appearing. The court said it need not in this case pass on the alternative ground of strict liability); *Kadylak v. O'Brien*, *supra*; *Sollak v. State of New York*, 1929 U.S.Av.R. 42.

⁴⁰*Rochester Gas & Elec. Co. v. Dunlop*, 148 Misc. 849, 266 N.Y.Supp. 469 (1933) (carefully operated plane attempting forced landing away from airport crashed against electric transmission line tower); *Gaidys v. United States*, 194 F.2d 762 (10th Cir. 1952) (crash of low flying jet plane on a house). See, also, *Strother v. Pac. Gas & Elec. Co.*, 94 Cal.App.2d 525, 529, 211 P.2d 624, 627 (1949) ("At the time of the accident plaintiff's airplane was trespassing on the property of the said defendant") (low flying plane striking defendant's power wires on defendant's easement).

In RESTATEMENT, TORTS § 159 (1934) and its comment *g* and § 165, and its illustrations 8 and 9, it is carefully pointed out that even though the plane's intrusion on the land below is against the operator's will and without any negligence on his part, the operator is liable for any harm caused thereby. He is not liable in such case, however, if no harm is caused, there being no technical trespass for lack of the requisite intent to enter.

⁴¹*Cannay v. Rochester Agr. & Mech. Ass'n*, 76 N.H. 60, 79 Atl. 517 (1911) (balloon crashing on party using the highway); *Miles v. Arena*, 23 Cal.App.2d 680, 73 P.2d 1260 (1937) (airplane dusting of field with insecticide drifting with wind to plaintiff's beehives and killing his bees); *S. A. Gerrard Co. v. Fricker*, 42 Ariz. 503, 27 P.2d 678 (1933) (somewhat similar facts: court emphasizes nuisance aspect); *Luthringer v. Moore*, 80 A.C.A. 123, 181 P.2d 89 (1947) (strict liability for damages caused by operators of pest control fumigation involving known or foreseeable use of highly volatile and penetrating deadly gas cannot be avoided through device of employing

contractor is clearly desirable and nowhere more desirable than in aviation. Whatever the future may hold, it is certain that today flying can be safe only by the most meticulous care in the construction and inspection of planes. Those who choose to fly and to invite others to share in their flight, should bear the responsibility of these essential precautions. Nothing is more difficult to prove than that the selection of independent contractors is improper. If aviators do not choose to see to the safeguards themselves, they should have every incentive to make certain that the work is done not only properly but by persons of sufficient financial responsibility to pay for any damage resulting from their carelessness. And, there is no greater incentive than fear of liability."⁴²

9. *The Broader Grounds for Aircraft Operator's Ground Damage Strict Liability Which Are Inherent in the Judicial Materials Have Found Expression by Leading Commentators.*

Various legal writings touching on problems in aviation law, though differing on other points, have concurred generally in recognizing that in the absence of applicable modifications by statute our judicial decisions invariably apply the common law of strict liability to cases of ground damage by the aircraft operator's crashes and forced landings outside of established landing areas. These legal writings also have in varying degrees recognized the three basic underlying considerations in cases of this type, which point toward strict liability, namely, one-sidedness of receipt of benefit and creation of risk to others, extrahazardous nature of the activity with respect to ground damage, and capacity of the type of enterprise through insurance or otherwise to distribute the loss to those who get the benefit.⁴³

independent contractor,—*dictum*) (*aff'd*, 31 Cal.2d 489, 190 P.2d 1 (1948) without dealing specifically with this point). See, generally to the same effect, PROSSER, TORTS 478 (1941).

RESTATEMENT, TORTS § 427 (1934) reads as follows:

"NEGLIGENCE IN DOING INHERENTLY DANGEROUS WORK.

"One who employs an independent contractor to do work which is inherently dangerous to others is subject to liability for bodily harm caused to them by the contractor's failure to exercise reasonable care to prevent harm resulting from the dangerous character of the work."

RESTATEMENT, TORTS § 835 (1934) reads as follows: "... and if

"(b) the activity is carried on pursuant to orders or directions negligently given by him and the invasion results because the activity is carried on in the prescribed manner, or ...

"(f) the activity is ultrahazardous even when carefully carried on."

⁴²Bohlen, *Aviation Under the Common Law*, 48 HARV. L. REV. 216, 237 (1934).

⁴³William A. Schnader, in reporting to the American Bar Association on the proposed Uniform Aviation Liability Act, stated as follows: "The person or the owner of property on the ground is absolutely helpless to avoid damage by aircraft. Crashes when they come are unheralded and unpredictable. The situation is entirely different from any other hazard to which persons and property are subjected. . . . There is no way to keep either persons or property out of the zone of possible aircraft crash. Accordingly, the feeling seems to be universal (except among aviators themselves) that for so-called ground damage, operators of aircraft must continue to be held liable regardless of negligence." 9 J. AIR L. 668 (1938).

At p. 670, Mr. Schnader continued as follows: "Obviously, the statutory and common law imposition of unlimited absolute liability upon all operators of aircraft for ground damage affords no protection whatever against harm at the hands of a flier whose resources are so meager that

The following statement from the pen of a distinguished legal aviation expert⁴⁴ was recently quoted with approval by a federal court:

"Important as the continued development of aviation is believed to be, no convincing reason has been presented why it should be subsidized at the expense of the luckless victim on the ground who, without participating in aviation in any way, is injured by an aircraft accident even though not attributable to the fault of the operator."⁴⁵

10. Aircraft Operators' Strict Liability for Ground Damage by Crashes and Forced Landings Was Vigorously Supported by the Principal Draftsman of the Restatement of Torts.

Professor Bohlen, the principal draftsman of the Restatement of Torts, has expressed his view as follows:

"So, too, aviation can be subsidized and fostered by relieving it from liability for those injuries to ground-owners which by the confession of counsel in the *Dunlop* case cannot be prevented by even the most meticulous care in preparation or in flight. If aviation, however, is so essential a means of transportation as to require a subsidy, a fairer distribution of the burden would place the cost upon the public treasury either by direct grant or under

he cannot afford a small premium to protect him against claims, and claimants against loss, resulting from contacts between his plane and objects on the ground.

"The committees were informed that the number of cases of ground damage are relatively very few. This, however, is small consolation for the owners of property or the relatives of persons who are the victims of the few crashes which do inflict ground damage."

Another legal author, W. M. Wherry, in 10 *AIR L. REV.* 337, 346 (1939), states as follows: "From the point of view of insurability, as it has been called, the aircraft presents the following characteristics: As between the operator and the landowner there is a one-sided advantage. All the advantage of the use of the air space by it enures to the aircraft, and none to the landowner. The power to protect or avoid the damage is not equal. The person on the land can not run away and take his land with him, but the operator of the airplane, which is mobile, has a greater opportunity to protect or avoid the accident. . . . In other words, we have the element of a one-sided risk, and also an unusual danger which would not otherwise occur if the aircraft did not have the characteristics of speed and control, and the power to come uninvited from a distance, and the ability to operate at a great height above the land. In addition to these characteristics, it is asserted, and it may well be probable, that the operator of the aircraft is better able to stand the damage. It is also claimed that he is better able to insure against it. This, however, is debatable, . . . For all these reasons, a strong case can be made for the imposition of the principle of liability without fault in connection with compensation for damage to persons and property on the ground by aircraft."

Rudolph Hirschberg, writing on *The Liability of the Aviator to Third Persons*, among other matters stated as follows: "The solution corresponding best with the underlying sociological principle, is to render liable that person who draws the advantage from the enterprise. He mostly will, but need not, be the owner." 2 *SO. CALIF. L. REV.* 405, 427 (1929).

He continues at p. 428: "The underlying principle of the whole liability, as we found before, is the idea that it is unjust that one receive the advantages of such enterprise; the other, its detriments. It follows from this basis that that person must be liable who draws the profits from the management; in other words, the commercial undertaker. He will not always be identical with the owner."

"Edward C. Sweeney, Editor of *The Journal of Air Law and Commerce*, Professor of Law at Northwestern University, former member of Civil Aeronautics Board, Professional Staff Member and Chief Counsel for U. S. Senate Committee on Interstate Commerce, for investigation of operational efficiency of the airline industry, 1949-1951.

⁴⁴19 *J. AIR L.* 317, 324 (1952), quoted in *Prentiss v. National Airlines*, 112 F.Supp. 306, 312 (D.N.J. 1953).

the guise of contracts for carrying mail. It is the public as a whole which has an interest in the development of aviation. The interest of any particular ground-owner is as one of the hundred or more million inhabitants of the United States. It is the acme of unequal taxation to make him bear the whole loss entailed by the destruction of his property through the crashing of a plane merely because he, as a member of the public, has a hundred-millionth interest in the development of aviation. But there is nothing to indicate that any subsidy is needed. Experience shows that the development of aviation is not substantially impeded by making it bear the risk of such accidents. Every Continental country imposes this liability, and there has been no suggestion of any difference of conditions in America which will make it impossible for American Aviation to survive this burden."⁴⁶

Professor Bohlen has further expressed his views as follows:

"... A passenger or guest in an airplane, knowing the risks which the adolescent-science of Aviation imposes upon those who choose to fly, is properly held to assume these risks. Persons who go to an airport out of curiosity or to welcome or bid farewell to airmen or their passengers are in the same position as the passenger. And, even more obviously, one who uses the facilities of an airport for his own flying and who necessarily knows the unavoidable risks involved in landing and taking off is entitled to no more than that other planes using the port shall be carefully prepared and flown. . . . Broad dicta in such cases, to the effect that the plaintiff is entitled to expect only that care which would be appropriate by land, are in no sense pertinent, therefore, to the determination of the aviator's liability to persons who have not consented that airplanes be flown over their land. Their citation in textbooks on Aviation Law and in Aviation Journals as authority for the contention that liability caused to surface-owners is to be similarly determined is entirely unjustified."⁴⁷

11. All Three Typical Basic Features Which on the Merits Point Toward Strict Liability Apply to Aircraft Operators Who Crash or Make Forced Landings on Ground Victims Outside of Established Landing Areas.

Three typical basic features which on the merits point toward strict liability are set forth, with supporting authorities, in Part I of this paper. They are the following: (1) One-sidedness of an activity with regard to receipt of benefits that accrue and one-sidedness in creation of risks to others in the type of activity point toward strict liability as the applicable law. Mutuality in these respects, on the other hand, most persuasively points toward negligence as the applicable law. (2) Inherently great danger to others in the type of activity in question points toward strict liability. (3) Ability of the type of enterprise which caused the damage to distribute the loss as part of its costs to those who receive its benefits point toward strict liability.

⁴⁶Bohlen, *Aviation Under the Common Law*, 48 HARV. L. REV. 216, 219 (1934).

⁴⁷*Id.* at 222-223.

Each of these three basic features applies to the facts of aircraft operators' crash and forced landing areas. This is readily shown on scrutiny of the facts of aircraft operation. Each of these basic features may here be briefly reviewed in turn with reference to its application to aircraft operation.

(a) One-sidedness Is Here Conspicuous. The Air Traffic Operator Creates the Danger and Gets the Immediate Benefits. The Ground Victim Though Taking No Part Suffers the Damage.

The first of these typical basic features, one-sidedness of the activity with regard to receipt of benefits and creation of risks to others is particularly noticeable in the case of aviation crashes and forced landings on persons or property on the ground. The operators of aviation activity receive their share of the direct benefits that in the instance are involved in the particular flight. The operators by their activity also create the risks and cause the damage to the crash victims below. Their victims below get no direct benefits whatever from this air traffic that now hits them. The victims below get no more of the indirect benefits of aviation than do all other members of the community. Airplanes crash down on their victims by force of gravity. Victims below do not fly up and strike the planes. Aviation operators get the benefits, create the risks to those below, and do the damage to those below. In this regard, their victims below endanger nobody overhead. They get no benefits. Yet they suffer the damage. Here the one-sidedness is glaring.⁴⁸

(b) The "Extrahazardous" Feature Continues Applicable to Aircraft Operation With Respect to Crashes and Forced Landings on Ground Victims Outside of Established Landing Areas Despite Current Improvements in Mechanical Equipment and Operational Technique Since the Early Days of Aviation.

Up to now, as already shown above, our judicial materials have consistently held that strict liability is applicable to aircraft operation with respect to crashes and forced landings on ground victims outside of established landing areas.⁴⁹ The Restatement of Torts has definitely taken the same position.⁵⁰ Loose dicta asserting that the law of negligence is broadly applicable to aviation may be found in various cases concerned with facts involving injury to passengers or collisions in the air.⁵¹ Such cases involve facts which are admittedly within the range where negligence is the *prima*

⁴⁸For particular emphasis on this one-sidedness as between the aircraft operator overhead and ground victims below outside of established landing areas, see the statement by W. M. Wherry, and the remarks of Wm. A. Schnader, note 43 *supra*.

⁴⁹See note 33 *supra*.

⁵⁰See notes 34 and 35 *supra*.

⁵¹Conspicuous among these is the following statement in the judge's charge to the jury in the case of Herrick & Olsen v. Curtiss Flying Service, 1932 U.S.Av.R. 110, 122 (mid-air collision): "I charge you, gentlemen, that aeroplanes are not regarded as inherently dangerous instrumentalities but the possibility from careless handling is obvious."

facie basis for liability. As Professor Bohlen has said of dicta from such cases:

"Their citation in textbooks on Aviation Law⁵² and in Aviation Journals as authority for the contention that liability caused to surface owners is to be similarly determined is entirely unjustified."⁵³

A more subtle challenge to the continued application of strict liability to aircraft operation with respect to crashes and forced landings on ground victims outside of established landing areas has taken an entirely different form. This challenge is based on the argument that as aircraft improvements continue air traffic will no longer be extrahazardous. This challenge apparently admits that in its inception aircraft operation was so fraught with danger to others as properly to be called extrahazardous. Hence it was at the outset subject to strict liability to outside ground victims who had taken no part involving assumption of its risks. Striking improvements in aviation equipment and operational technique have now taken place. Many believe that even greater improvements are in prospect. Various pertinent statistical studies have now become available.⁵⁴ These apparently confirm in large measure the contention that in many respects regular commercial air traffic shows a record of safety, on the whole as good as or even better than that of rail or motor traffic. Such data naturally suggest that as a matter of fact aircraft operation is now, under the improved conditions, little if any more dangerous than other kinds of traffic.⁵⁵ Whether or not so very broad a fact conclusion on the data now available is justified is open to question.⁵⁶ It

⁵²A conspicuous example is RHYNE, *AVIATION ACCIDENT LAW* (1947), in which, at p. 65, appears the following: "The Courts declared that the airplane is not an inherently dangerous instrumentality and that liability for damage caused by airplanes should be worked out by use of the time-tested rules of the common law which base liability upon 'fault' or negligence in failing to use ordinary care." The only judicial material cited by the author in support of this statement consists of two cases. One of these, *Herrick & Olsen v. Curtiss Flying Service*, *supra* note 51, was a case of mid-air collision. The other, *Fosbroke-Hobbes v. Air Works, Ltd.*, 56 Ll.L.R. 209, 1 All Eng.L.R. 108 (1937), 1938 U.S.Av.R. 194, was a case where a passenger was injured through the crash of the plane in which he was riding. This book itself industriously gathers citations to cases of aviation accidents. As it seems to me, however, this book discloses little or no analysis of the differences in the underlying considerations which lead to the sharply drawn differences in result as between cases of mid-air collisions and cases of injuries to plane passengers on the one hand and on the other hand, cases of injuries to ground victims outside of established landing areas.

⁵³Bohlen, *supra* note 46, at 223.

⁵⁴Careful discussion and appraisal of available information of this type is found in Sweeney, *Is Special Aviation Liability Legislation Essential?* 19 J. AIR L. 166-183, 317-337 (1952).

Sources for statistical material of relatively recent vintage are also referred to in Plick, *Liability of Aircraft for Injuries to Innocent Parties on the Ground*, 3 CATHOLIC U. L. REV. 122-127 (1953); and in Orr, *Airplane Tort Law*, 1952 INS. L.J. 120-129.

⁵⁵In *United States v. Kesinger*, 190 F.2d 529, 531 (10th Cir. 1951), the court introduces some statistical figures relating to safety in passenger air travel with the observation that, "On the basis of passenger miles flown it is relatively as safe as other methods of public transportation."

⁵⁶Consider, for instance, the cautious remark found in Sweeney, *supra* note 54, at 168: "The total number of fatalities attributable to aviation is insignificant in comparison with the number of persons injured by railroad trains and automobiles. Moreover, any comparison of the rate of accident frequency depends very largely upon the standards used for the comparison. The fact that the ratio of non-fatal to fatal injuries differ markedly between the various forms of transportation emphasizes the importance of the standard of comparison employed."

apparently is generally agreed, however, that aircraft operation is now, on the whole, much safer than it was at the outset.

It is sometimes argued from such data that when air traffic becomes as safe as motor traffic or rail traffic strict liability will no longer be properly applicable since the reason for its application will thus have disappeared.⁵⁷ An indiscreet and unnoticed erroneous assumption apparently is hidden in this type of argument. This type of argument apparently assumes that the dictionary meaning of "ultrahazardous" is the sole criterion for determining the proper application of strict liability to aircraft operation. On that assumption the asserted conclusion would follow if and when adequate proof of the facts of safety can be made.

The fatal flaw in this type of reasoning of course is in the erroneous assumption involved in its major premise. The dictionary meaning of "extra-hazardous" or "ultrahazardous" is by no means the sole criterion for determining whether or not strict liability is properly to be applied. As already indicated in some detail above, at least two other basic features on the merits also point toward strict liability. One of these is one-sidedness of an activity with regard to reaping of benefits and creation of risks to others. As already indicated above, this basic feature, one-sidedness, is actually included under another form of words in the definition of ultrahazardous activity which is embodied in the Restatement of Torts. Another of these features is the ability of the type of enterprise to distribute the loss through insurance or otherwise as part of its costs to those who receive its benefits.

The physical facts of traffic in the air above persons and property below would seem to make inevitable that the physical law of gravity will continue to apply. It therefore seems to me utterly unlikely that, as between air traffic overhead and outside ground victims beneath, one-sidedness will give way to mutuality by reason of improvements in aviation equipment and technique and increasing use of air traffic. In this regard aviation operators will continue to create the risks, and will continue to do damage to their ground victims outside of established landing areas. Overhead traffic will from time to time involve crashes or forced landings. In this regard ground victims will continue to endanger nobody overhead. They will continue to get no direct benefits. They will continue to suffer the damages inflicted by crashes and forced landings. In this regard, even though the air traffic safety

⁵⁷See, for instance, Gatlin, *Tort Liability in Aircraft Accidents*, 4 VAND. L. REV. 857 (1951).

An echo of this ill-considered and inadequately analyzed idea apparently is found, too, in the statement in PROSSER, TORTS 154 (1941): "So far as aviation is concerned, it was of course regarded at first as a questionable and highly dangerous enterprise, properly subject to strict liability for damage to persons or property on the ground. As it becomes progressively safer, and more generally accepted as a means of transportation, this view must ultimately be altered." It is to be hoped that this careful and profound scholar, who is the author of this most outstanding and useful book on Torts, will ponder seriously whether or not to let that last sentence stand unqualified and unmodified in a soon forthcoming new edition.

record should sometime equal the safety record of motor or rail transportation, the one-sidedness as between the aircraft operator overhead and the ground victim beneath will continue to be glaring.

Again, even though the air traffic safety record were to equal that of motor or rail transportation, that mere circumstance will not of itself dispense with the third basic feature which on the merits points toward strict liability. That basic feature is the ability of the type of enterprise to distribute the loss through insurance or otherwise as part of its costs to those who receive its benefits.

Accordingly, even though air traffic safety may further improve, weighty reasons for strict liability of air traffic operators to ground victims outside of established landing areas will continue to be applicable. The basic features on the merits pointing toward strict liability are by no means all included in the dictionary meaning of the word "extrahazardous". The term "extrahazardous", when used as a legal shorthand definition of requisites for strict liability includes also broader basic considerations of policy.

(c) The Aviation Industry Is a Type of Enterprise Which Can Distribute the Loss From Crashes and Forced Landings on Outside Ground Victims Through Insurance or Otherwise as Part of Its Costs to Those Who Receive Its Benefits.

Large airlines are among the giants of big business of our time. That is a matter of common knowledge. The large volume of air passenger business is now often in various respects compared with the volume of railway passenger business.⁵⁸ Some large airlines have coast to coast air service in this country. Others have even more far-flung international or around the world air service.

The loss from occasional airline crashes and forced landings upon occasional ground victims outside of established landing areas is actually a part of the costs of operation of airline air traffic. It is in reality just as much an actual part of the overhead costs of air traffic as is the wear and tear on the machinery and equipment used in such air traffic.

Such loss, like other costs, can be reckoned.

Unless airline air traffic is to be subsidized its customers, the passengers and shippers who receive the benefit of its service, must pay enough in charges for the service to cover its costs. In the ordinary course of business this will involve as added costs the amount required for insurance premiums to cover such losses. By this process the customers of airline air traffic who reap its direct benefit will also carry its burdens.

True, some protagonists have argued that air traffic should be favored

⁵⁸See, for instance, the data referred to in notes 54 and 55 *supra*.

because of its economic and social importance to the community, or because of its importance to national defense.⁵⁹

The close resemblance between this argument and the now discredited old case of *Winterbottom v. Wright*⁶⁰ is at once apparent. That case asserted that the manufacturer of dangerously defective negligently manufactured goods was not to be held liable for injuries caused thereby to anyone beyond the manufacturer's own immediate purchaser. It was thought to be socially undesirable to throw so heavy a burden upon the manufacturing industry. That viewpoint on public policy as to negligence liability of manufacturers of goods was later repudiated in this country in many decisions from the leading case of *MacPherson v. Buick Motor Company*⁶¹ to *Carter v. Yardley & Company*.⁶² Those cases recognize that in their setting it is socially undesirable thus to sacrifice innocent victims in order to afford for the manufacturing industry a special privilege of escape from the prima facie applicable liability for negligence. In this perspective of public policy one may well wonder on what basis it can reasonably be regarded as socially desirable to sacrifice innocent ground victims outside of established landing areas in order to afford for the aviation industry a special privilege of escape from the prima facie applicable strict liability.

Even if it be granted, however, that for public reasons, such as its importance to national defense, the aviation industry properly should be specially favored, that affords no reason in fairness for requiring the luckless occasional ground victim of crashes or forced landings to subsidize air traffic in which he takes no part by bearing without compensation the entire loss which the crash or forced landing inflicts upon him by the destruction of his house or his body and life.⁶³

With private flying for business or pleasure this general picture remains essentially unchanged. It still remains true that there are occasional crashes and forced landings upon outside ground victims. It still remains true that

⁵⁹See, for instance, *Coblenz, Limitations of Liability for Aircraft*, 23 SO. CALIF. L. REV. 473 (1950).

⁶⁰*Exchequer*, 10 M. & W. 109 (1842). For an excellent though brief discussion of this case, with appended references to various law review articles thereon by leading jurists, see PROSSER, *TORTS* § 83, pp. 673-675 (1941).

⁶¹217 N.Y. 382, 111 N.E. 1050, L.R.A. 1916 F 696 (1916). See PROSSER, *TORTS* § 83, pp. 677-688 (1941) for convenient discussion of merits and survey of current authorities. *Accord*, *Kalesh v. Los Angeles Ladder Co.*, 1 Cal.2d 229, 34 P.2d 481 (1934); *RESTATEMENT, TORTS* § 395 (1934).

⁶²319 Mass. 92, 64 N.E.2d 693 (1946). This case after presenting a systematic review of the legal materials analyzed in the light of the underlying merits involved, rejects the case of *Winterbottom v. Wright* as ill-considered and erroneously followed, overrules the local Massachusetts decisions that have followed in its wake, and adopts the position announced in *MacPherson v. Buick Motor Co.*

⁶³The very emphatic comment on this aspect of the argument by Professor Bohlen, the principal draftsman of the *Restatement of Torts*, is given in the text above with citation to note 46 *supra*.

insurance coverage can ordinarily be obtained for such flying,⁶⁴ the premiums for which can be reckoned as part of the necessary costs of operation. If such flying is to be specially favored for supposed reasons of policy that circumstance affords no reason for requiring the luckless outside ground victim to subsidize this private flying, in which he takes no part, by bearing without compensation the entire loss which the crash or forced landing inflicts upon him by the destruction of his house or his body and life.⁶⁵

It is unnecessary further to elaborate this feature of essential insurability which enables the aircraft operator to distribute the loss to those who get the direct benefits of aviation. It is readily apparent therefrom that the general expressions of principle set forth on this matter in Part I of this paper are applicable to the distinctive facts of aircraft operation emphasized in subdivision 11 of Part II of this paper. The brief excerpts that follow may serve as convenient illustrations:

"Where there is no blame on either side . . . ask, in view of the exigencies of social justice, who can best bear the loss."⁶⁶

". . . may spread the risk through insurance and carry the cost thereof as part of the costs of doing business."⁶⁷

"However intermittently such injuries may occur, and however hazardedly they may strike, the risk of their occurrence is a constant risk and a general one. Against such a risk there should be a general and constant protection and the . . . is best situated to afford such protection."⁶⁸

"That needed protection is to shift the immediate incidence of the hazard of life . . . away from the individual over to a group which can distribute the loss; and to place the loss where the most pressure will be exerted to keep down the future losses."⁶⁹

"What is at stake, . . . is the cost of reasonable protection, the amount of the insurance premium as an added burden on its finances, not the awarding over in damages of its entire assets."⁷⁰

"A truer and more useful appraisal of the interests and policies . . . will

⁶⁴That insurance coverage is available for private flying on payment of the requisite premium can be verified by application to any reputable aviation insurance underwriter. The matter of insurance coverage for aviation is discussed at some length in Sweeney, *supra* note 54, at 176-178. It is there shown that in 1939 all domestic air carriers carried liability insurance as a matter of good business practice. However, "only 5.8% of all non-air carrier aircraft were insured against passenger liability; 11.2% against public liability and 9.8% against property damage." (p. 176). Further discussion by this author here intimates that high premium rates make the expense of carrying insurance a serious burden for private flying to sustain. In this regard, however, no attempt is made to segregate the part of the premium which is applicable to liability to the occasional but relatively infrequent outside ground victims. The liability toward passengers, shippers, or other users of the air traffic, of course, is encountered much more frequently, and it is this liability that potentially may reach astronomical proportions in disasters involving large passenger air lines.

⁶⁵See note 46 *supra* for Professor Bohlen's emphatic comment on the question of policy here involved.

⁶⁶Pound, *supra* note 20.

⁶⁷Traynor, J., *supra* note 27.

⁶⁸Traynor, J., *supra* note 22.

⁶⁹Llewellyn, *supra* note 22.

⁷⁰Rutledge, J., *supra* note 29.

result from thinking through . . . in terms of distribution of losses through insurance rather than proceeding on the false and misleading assumption that the individual defendant pays the damages when in so many cases he does not."⁷¹

"The dangerous enterprise must 'pay its way'. . . ."⁷²

12. *When There Is No Binding Judicial Precedent Precisely in Point on Facts That Are New, Choice of Controlling Analogy Must Depend on the Merits.*

Binding judicial precedent precisely in point on the detailed facts may be lacking as new practices present novel fact combinations. The choice of controlling analogy is then to be determined by consideration of the underlying merits. Numerous judicial expressions give effect to this viewpoint. The following authoritative judicial pronouncements on this point are here included as a matter of convenience:

"It is not significant that a property as distinguished from a personal injury was there involved. The important factor is that certain activities under certain conditions may be so hazardous to the public generally, and of such relative infrequent occurrence, that it may well call for strict liability as the best public policy."⁷³

"The extent to which one man in the lawful conduct of his business is liable for injuries to another involves an adjustment of conflicting interests. The solution of the problem in each particular case has never been dependent upon any universal criterion of liability (such as 'fault') applicable to all situations."⁷⁴

"The common law never has been so inflexible as to prohibit the application of basic rules and principles to new situations arising in a rapidly changing and developing society. Our failure to discover a case in which recovery has been allowed for injuries resulting from the use of this gas for fumigating on the theory of absolute liability does not prevent the application of the rule to the present situation."⁷⁵

"Declarations in the form of statements of general principles in those cases must be viewed in the light of the facts under consideration. Neither appellant nor respondents have brought to our attention a decision in a case exactly like this one. We have made an independent examination, and find none. The nuisance per se and inevitable calamity cases have served, for the greater part, to lead us to the conclusion that the rule that injury may exist without liability is, as has been so well stated by another court, 'contrary to the general rule of liability where injury is caused . . . ' . . ."⁷⁶

"When new practices spring up, new combinations of facts arise, and cases are presented for which there is no precedent in judicial decision, they

⁷¹James, *supra* note 26.

⁷²Peek, J., *supra* note 31.

⁷³Carter, J., in *Luthringer v. Moore*, 31 Cal.2d 489, 500, 190 P.2d 1, 8 (1948).

⁷⁴Augustus N. Hand, J., in *Exner v. Sherman Power Construction Co.*, 54 F.2d 510 (2d Cir. 1931), 80 A.L.R. 686.

⁷⁵Peek, J., *supra* note 31.

⁷⁶Waste, C. J., in *Green v. General Petroleum Corp.*, 205 Cal. 328, 270 Pac. 952, 955 (1928).

must be governed by the general principle applicable to cases nearly analogous, but modified and adapted to new circumstances by considerations of fitness and propriety, of reason and justice, which grow out of those circumstances. . . . The general considerations of reason, justice and policy which underlie the particular rules of common law will still apply, modified and adapted, by the same considerations to the new circumstances."⁷⁷

III.

Aviation Flying School Operators Who Send Planes Aloft in Student Pilot Solo Flight Training Are Subject to Strict Liability to Ground Victims Outside of Established Landing Areas.

The operators of flying schools, as well as individual student pilots whom they send aloft in solo flight training, are subject to strict liability to ground victims outside of established landing areas for crashes and forced landings which occur in course of such solo flight training. This is correct, taking the facts of flying school operations just as they are, and taking the common law just as it is, unmodified in this respect by applicable special legislation. Careful scrutiny of the actual facts of flying school operations readily discloses that they fulfill the traditional common law requisites for the application of strict liability to ground victims outside of established landing areas. In this regard the facts themselves, as well as the legal requisites, may here be briefly reviewed in turn:

1. The Flying School Operator Sends the Plane Aloft in Student Pilot Solo Flight Training.

Aviation student pilot training necessarily starts with untrained pilots. During the early stages of pilot training the actual flying involved is done in the course of so-called dual instruction. The instructor rides with the student in a plane with dual controls. At some stage in training the partly trained student pilot must begin to operate the controls. At a more advanced stage in training the student pilot must make solo flights.⁷⁸

⁷⁷Shaw, C. J., in *Norway Plains Co. v. Boston & Maine Railroad*, 1 Gray 263, 266 (Mass. 1854).

⁷⁸Russell, *Liability of a Flying School for Damage Done by a Student Pilot*, 4 AIR L. REV. 254 (1933). At pp. 255-256 of this article the author sets out briefly the routine followed in giving instruction to student pilots. This author's description of the sequence of instruction from dual-controlled to solo flying appears most vividly in the following sentences: "In most, if not all, cases a man who desires to learn to fly enrolls in a flying school, pays his money for the course of instruction, is taken up by an instructor, who is an employee of the flying school, in a dual-controlled ship owned by the flying school and after some eight or ten hours in the air (depending upon the student's natural aptitude) during which time he has actually manipulated the controls under the supervision of the instructor, has flown the ship, and has made several take-offs and landings, he will be permitted to make his first solo flight, if and when, in the opinion of the authorities of the school, he is competent to do so. In addition to flying in the air in a dual-

It is important to notice at this point, in scrutinizing the facts of student pilot solo flight training, that the flying school operator actually sends the student pilot plane aloft for solo flights. He directs the partly trained student pilot when to do solo practice.⁷⁹ He directs what operations or maneuvers the student pilot is to perform in the course of the particular solo flight in question.⁸⁰ He starts the partly trained student pilot on the solo flight in question.⁸¹ Student pilot solo flights in course of training are a part of the regular course of business of the flying school.⁸²

Whatever verbal label may be adopted by the flying school operator for describing the legal relationship between himself and the student pilot⁸³ in

controlled ship, he receives a certain amount of instruction in various matters, such as the construction of a plane and the motor, the air traffic rules, etc.”

It may be added that the Civil Air Regulations promulgated by the Civil Aeronautics Board in Washington, D. C. under the authority of the federal statutes give the operator of the flying school a large measure of control over student pilots in the course of training for pilot's licenses.

A student pilot shall not operate an aircraft in solo flight until he has passed certain examinations, has been found competent by a flight instructor to make such a flight, and authority therefor has been indorsed by such instructor on the student pilot certificate. § 43.53. He shall not pilot an aircraft outside a local flying area designated by his flight instructor. § 43.54. He shall not pilot an aircraft other than that of the category, class and type which has been indorsed on his student pilot certificate by his flight instructor. § 43.55. A student who has not piloted a powered aircraft within 90 days shall not pilot such aircraft in solo flight until he has passed a flight check given by a flight instructor, and that fact has been indorsed by such flight instructor in the student pilot logbook. § 43.56.

⁷⁹Transcript of Record, pp. 40 *et seq.*, *Boyd v. White*, Civil No. 77860, Calif. Super. Court, County of Santa Clara, July, 1953.

Russell, *supra* note 78, at 256:

“Of course, the weather conditions should be appropriate for a novice, *e.g.*, the air must be free from fog, low clouds, treacherous winds, etc. The flight should be timed to take place when the air in immediate vicinity is reasonably free from heavy aerial traffic. The plane should be carefully inspected before the student is allowed to take-off.”

Id. at 263: “For example, the plane could not be taken up unless the school so permitted. The proper officer of the flying school has decided, in the light of the student's previous flights, and in the light of past experiences with other students, that he is competent to fly solo. The school has also decided that the weather is propitious in respect of wind, absence of fog, etc., it has inspected the plane and has decided that it is in proper shape; and it has decided that the hour set for the solo flight is one in which there will be comparatively few planes in the air, bearing in mind the location of the flying field, the time of day, the day of the week, etc.”

⁸⁰*Boyd v. White*, *supra* note 79, at 48, 50.

⁸¹*Ibid.*

⁸²“Without discussing, for the moment, whether the student pilot is an agent, servant, or employee of the flying school, the flight is undoubtedly being made in the regular course of business of the flying school.” Russell, *supra* note 78, at 257.

“As previously stated, the plane is being flown in the regular course of business of the flying school, and the flying school has been paid for a course of instruction which necessarily includes a solo flight.” *Id.* at 263.

⁸³It is often said at airfields that the student pilot “rents a plane” from the flying school, at so much per hour, etc. Even if technical legal precision in the use of terms borrowed from other settings were possible, such minute precision is not to be expected under these circumstances.

Such terms as lessor and lessee, licensor and licensee, or bailor and bailee apparently are in this setting preferred by flying school operators and their legal advisers. These terms are preferred because they carry the connotation, if accepted literally, that the bailor is not answerable for the bailee's negligence, the bailee not being an agent or servant of the bailor but rather an independent contractor. If the terms master and servant or principal and agent were here used, the connotations would be the other way under the doctrine of *respondet superior*. Very little discussion of this

course of solo flight training,⁸⁴ the fact clearly is that the operator of the flying school is an active participant in causing that solo flight in course of training to take place. It is therefore not a figure of speech but a literal recital of the actual fact to say that the flying school operator, in such cases, sends the plane aloft.⁸⁵

particular point, so far as it concerns the facts involved in student pilot solo flight training, has appeared in the law reviews.

In Russell, *supra* note 78, at 256, 257, it is well stated that "Owing to the nature of an airplane, the relation of the student pilot to the school is difficult to fit into the well-recognized legal classifications."

See also note 85 *infra*.

⁸⁴Violation of instructions, violation of regulations, and deviation or departure from the course of flight training prescribed by the flying school present possibilities of controversy the legal effects of which this paper does not attempt to explore. This paper is concerned with the liability which is imposed where the student pilot solo flight in course of training results in a crash or forced landing upon ground victims outside of established landing areas.

⁸⁵It has of course been held in various cases, not involving student pilots in course of training nor damage to outside ground victims, that bailments of airplanes can be made if the respective parties see fit to do so. The bailee, in such cases, can be answerable to the bailor for negligently damaging the plane while in his possession. *Braman-Johnson Flying Service v. Thomsen*, 167 Misc. 167, 3 N.Y.S.2d 602 (1938) (pilot of 10 years' experience who had rented a plane for his own purposes crashed and injured the plane through negligently running out of gas and failing to turn on an available reserve supply which would have carried him to safe landing); *United Air Services v. Sampson*, 30 Cal.App.2d 135, 86 P.2d 366 (1938) (hirer of a plane who supplied his own licensed pilot for the journey was here held to be liable for damages to plane caused by pilot's negligent operation on view that under the evidence in the record pilot was hirer's agent rather than an independent contractor); *Shook v. Beals*, 96 Cal.App.2d 963, 217 P.2d 56, 18 A.L.R.2d 919 (1950) (all members of a party who went on a fishing trip for which they jointly hired a plane were held answerable as principals in a joint adventure for damage to the plane by the negligent conduct of one of their number who as the only licensed pilot among them operated the plane during their trip).

Such cases as the immediately foregoing obviously are between other parties on other types of facts than are found in the relation of flying school operator and student pilot in course of training. They do not in any way touch the question of to what extent the special relations between flying school operator and student pilot in course of training modifies the asserted bailor-bailee relationship. Neither do they in any way touch the question of the liability of either to outside ground victims during the course of student pilot solo flight training.

Two other cases decided by the California District Court of Appeal should be mentioned in this connection. In *Ambassador Airways v. Frank*, 124 Cal.App. 56, 12 P.2d 127 (1932), a student pilot was held answerable to the flying service operator for damage to the plane caused by his negligence while on a solo flight. In that connection the court referred to the student pilot as subject to the liability of a bailee in possession. Whether or not the operator of the flying school would in such a case be jointly liable as a participant through sending that solo flight aloft in case a forced landing on outside ground victims resulted was not before the court and was not decided.

Again, in *Johnson v. Central Aviation Corp.*, 103 Cal.App.2d 102, 229 P.2d 114 (1951), a student pilot proceeded to taxi the flying school operator's plane to the office at the airport where in the normal course, at his stage of instruction, he expected to be checked out for a solo flight. In doing so he negligently collided with another owner's plane which also was there on the ground at the time. The court held, in this case, that as the student pilot was not a servant or agent of the flying school instructor but rather some type of bailee or licensee the doctrine of *respondeat superior* did not apply. The flying school instructor was under these circumstances held not liable as a principal for the negligence of the student pilot.

Here, as in the *Frank* case, *supra*, whether or not the operator of the flying school would in such a case be jointly liable as a participant through his sending a solo flight aloft in case a forced landing on outside ground victims resulted was not before the court and was not decided. That problem actually was before the trial court in the case of *Boyd v. White*, *supra* note 79. That court held that under such circumstances the flying school operator as well as the student pilot was liable for the damage caused by the crash or forced landing upon the ground victim outside of established landing areas.

2. All Three Typical Basic Features Which on the Merits at Common Law Point Toward Strict Liability Apply with Accentuated Emphasis to the Activity of Flying School Operators in Sending Planes Aloft in Student Pilot Solo Flight Training.

As already set forth more at length above, at least three typical basic features on the merits point toward strict liability. These are the following: (1) One-sidedness of an activity with regard to receipt of benefits that accrue and one-sidedness in creation of risks to others point toward strict liability as the applicable law. Mutuality in these respects, on the other hand, most persuasively points toward negligence as the applicable law. (2) Inherently great danger to others in the type of activity in question points toward strict liability. (3) Ability of the type of enterprise which caused the damage to distribute the loss as part of its costs to those who receive its benefits points toward strict liability.

Each of these three basic features applies with accentuated emphasis to the facts of crashes and forced landings in course of student pilot solo flight training. This is readily shown, on scrutiny of the facts in such student pilot solo flight training. Each of these three basic features may here be briefly reviewed in turn with reference to its application to student pilot solo flight training:

- (a) One-sidedness Is Here as Conspicuous as in Flights Operated by Pilots Holding Private or Commercial Flying Licenses. The Flying School Operator Who Sends the Plane Aloft Participates in Creating the Danger, and in Reaping the Benefits. The Ground Victim of the Crash Though Taking No Part Suffers the Damage.**

The first of these typical basic features, one-sidedness of the activity with respect to receipt of benefits and creation of risks to others, is here very conspicuous. Planes operated in course of student pilot solo flight training occasionally crash or make forced landings. Where these take place in populated regions ground victims outside of established landing areas now and then are luckless victims.

It is as true of aviation pilot training solo flights as it is of other aviation that the participants in that activity aloft get the direct benefits and create the risks to the victims below. In pilot training solo flights the participants are the pilot in course of training and the operator of the flying school who sent him aloft. The pilot gets his training. The flying school operator who sent the plane aloft gets his income or fee for this item in the course of his service or business.

The luckless ground victim outside of established landing areas gets no direct benefit from this activity. His indirect benefits, if any, are no more

and no different from that of all other members of the community. The plane crashes down on him by force of gravity. He does not fly up and strike the plane. He gets no benefits. He suffers the damage. The solo flight student pilot and the flying school operator together brought about the flight above which endangered and damaged the luckless victim below. The luckless ground victim endangered no one and got no benefits, yet he suffered the damage. Here the one-sidedness is as glaring as it is in any other case of crashes and forced landings on ground victims outside of established landing areas.

(b) The "Extrahazardous" Feature Continues Very Acute With Respect to Crashes and Forced Landings on Ground Victims Outside of Established Landing Areas by Planes in Course of Student Pilot Solo Flight Training.

The second of these typical basic features pointing toward strict liability, extrahazardous nature of the activity, is conspicuous in the familiar facts of aviation student pilot training. Even those who may be inclined to reject the view that aviation in general as at present conducted is an extrahazardous activity apparently readily admit that airplanes in flight when mechanically defective or incompetently or carelessly operated are extrahazardous instrumentalities with respect to persons and property on the ground below.⁸⁶

Aviation student pilot training, as already mentioned, necessarily starts with untrained pilots. At some stage in training the partly trained student pilot must begin to operate the controls. At a more advanced stage he must make solo flights. At the solo flight stage the plane is under the control of a person whose fitness for a private pilot's license has not as yet been demonstrated. The student pilot's solo flying is thus experimental, being his effort to increase his skill and experience and to demonstrate his fitness. Minor violations of directions, and minor violations of safety regulations, at this stage are reputed to be frequent. Student pilots in training often do not

⁸⁶"An aeroplane entrusted for the purpose of flight to an inexperienced, incompetent, or unqualified person is likely to injure other persons either in the air or on the ground—I have already declined to charge as a matter of law that the plane standing by itself is such a dangerous instrumentality, but only that it might become such in flight." *Herrick & Olsen v. Curtiss Flying Service*, 1932 U.S.Av.R. 110, 122, 129.

"One who flies an aeroplane is opposing mechanical forces to the force of gravity and is engaged in an undertaking which is fraught with gravest danger to persons and property beneath if it is not carefully operated or if the mechanics of the plane and its attachments are not in first class condition. At common law, the hazardous nature of the enterprise subjected the operator of the plane to a rule of absolute liability to one upon the ground who was injured or whose property was damaged as a result of the operation. A.L.I. Restatement of Torts, Secs. 519, 520(d); Prosser on Torts, p. 452." *Parker, C. J., in D'Anna v. United States*, 181 F.2d 335, 337 (4th Cir. 1950).

"Now it is considered that properly handled by a competent pilot an airplane is not an inherently dangerous instrument." *Van Dyke, J., in Johnson v. Central Aviation Corp.*, 103 Cal. App.2d 102, 111, 229 P.2d 114, 120 (1951).

"An automobile and a motor boat do not have to overcome gravity. The vehicle can be stopped by shutting off the motor and can even be reversed; whereas an airplane must keep going or fall to the ground." *Russell, supra* note 78, at 264.

adequately appreciate the seriousness of such minor violations until they get more experience. Lack of flying experience and minor errors in judgment readily go together. This combination can readily create flying emergencies calling for forced landings. Forced landings by partially trained student pilots on solo flight training have been said to be relatively more dangerous than forced landings by aviation pilots of larger experience.⁸⁷ Forced landings in the course of such student pilot solo flying seem to be a matter of common knowledge among aviators.

When such mistakes occur airplanes operated by partially trained student pilots in solo flights may readily and reasonably be regarded by others than aviators themselves as dangerous instrumentalities with respect to persons and property on the ground below.⁸⁸

Under these circumstances it is very clear that planes operated by partially trained student pilots in course of student pilot training "necessarily involves risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of the utmost care."⁸⁹ It is equally clear that the activity of solo flying in course of student pilot training "is not a matter of common usage."⁹⁰ Solo flying in course of student pilot training is not "customarily carried on by the great mass of mankind or by many people in the community."⁹¹

Solo flights in course of student pilot training thus afford a superb and most vivid example of the type of activity which is "ultrahazardous" as that term is defined in the carefully worded language of the Restatement of Torts.⁹²

It may be added that this section of the Restatement of Torts was followed with almost literal exactness by the Supreme Court of California in applying the common law of strict liability to operations of pest control fumigation which involved the use of a highly volatile and penetrating deadly gas.⁹³ This section of the Restatement of Torts was also recently applied by a California Superior Court in holding the flying school operator subject to strict liability to an outside ground victim damaged by the crash in course of training of a student pilot solo flight plane that he had sent aloft.⁹⁴

⁸⁷"In the case of a forced landing a pilot with more experience would have a better chance of getting an airplane down." *Boyd v. White*, *supra* note 79.

⁸⁸See note 95 *supra*.

⁸⁹RESTATEMENT, TORTS § 520(a) (1934).

⁹⁰RESTATEMENT, TORTS § 520(b) (1934).

⁹¹RESTATEMENT, TORTS § 520, comment *e* (1934).

⁹²RESTATEMENT, TORTS § 520 (1934).

⁹³*Luthringer v. Moore*, *supra* note 16.

⁹⁴*Boyd v. White*, *supra* note 79. For the language of this Superior Court in making its ruling, see note 34 *supra*.

(c) Aviation Flying School Activity Is a Type of Enterprise Which Can Distribute the Loss From Its Crashes and Forced Landings on Outside Ground Victims Through Insurance or Otherwise as Part of Its Costs to Those Who Receive Its Benefits.

The third of these typical basic features which at common law points toward strict liability, the ability of the type of enterprise to distribute the loss to those who receive its benefits, is also conspicuous in connection with aviation student pilot training. The most direct benefits of aviation student pilot training go to several parties. There is the student pilot himself who gets the benefit of this instruction and training. There is the operator of the flying school who gives the instruction for pay. There may be also a different plane owner who for pay supplies the plane, in the instance, for immediate use by the student who takes the plane aloft. The ground victim of the crash or forced landing, in student pilot solo flying, gets none of the direct benefits. He does nothing to endanger the solo flight which other parties send aloft. He merely suffers without previous warning whatever damage, trivial or tragic, as the case may be, that the crash in the instance inflicts.

The ordinary ground victim in such cases is, like most of us, relatively poor. To such a victim such a disaster can be a major tragedy. The victim's body may be mangled by impact of the crashing plane. The house that is crashed on may be set on fire.

Youthful and immature student pilots, on the average, cannot be expected to be well-fixed financially. They usually have not the means required to pay for the damages done where the loss involved is more than trivial. Many of them are reputed to work at other jobs, taking pilot training on the side when and as far as they can earn enough to pay the current training fees. One recently reported example is that of a student pilot coming to the airfield for practice early in the morning, before going to his regular job for the day.⁹⁵ In another recent case the young student pilot was working in a cannery on week days and came out to the airfield for his pilot training on Sunday.⁹⁶ It seems to be common knowledge in aviation circles that the financial responsibility of youthful aviation student pilots often is negligible.⁹⁷

⁹⁵"He was working, and in order to get in his flying hours he was accustomed to go to the airfield where cross-appellant conducted its school and kept its planes, generally arriving early in the morning so that he might put in some hours before he had to go to his employment for the day." *Johnson v. Central Aviation Corporation*, 103 Cal.App.2d 102, 110, 229 P.2d 114, 119 (1951).

⁹⁶One vivid illustration is afforded by the student pilot in the case of *Boyd v. White*, *supra* note 79. He was at the time of the accident unmarried, in his early twenties, living at home with his mother, and working in a cannery. At the time of the accident he was paying for his pilot training out of his own pocket. As a returned veteran he had had some earlier training paid for under the G. I. Bill.

⁹⁷Conversations with a considerable number of youthful pilots who more recently have been enrolled in my law classes bear out this statement. This position is also reflected in the quotations appearing in note 103, *infra*.

The flying school operator, however, is in these instances an additional person who actively takes part in the conduct which causes the damage. In the course of student pilot training he knowingly sends training planes aloft in charge of only partially trained student pilots. He sends these partially trained student pilots aloft in solo flights. He thereby directly takes a leading part in creating the well recognized risks of crashes and forced landings by such student piloted training planes upon ground victims outside of established landing areas. In pilot training solo flights the risk of such crashes and forced landings on ground victims outside of established landing areas is a constant risk and a general one.

Protection is needed against this general and constant risk to outside ground victims. The flying school operator carries on this business whose activity directly creates that risk. He directly receives its benefits through the income it produces. He is therefore preeminently one who, as a matter of fairness, as a matter of justice between actor and victim, can be required to provide protection against that known and constant risk. To paraphrase Judge Traynor's words,⁹⁸ "However intermittently such injuries may occur, and however haphazardly they may strike, the risk of their occurrence in student pilot training is a constant and a general one. . . . That risk of injury can be insured by the flying school operator and distributed among his customers as a cost of carrying on the flying school business."

The risks of forced landings in student pilot training solo flights are not only typical but insurable. One convenient example found in the report of a litigated case shows insurance was issued covering any student pilot while under supervision, etc.⁹⁹ Inquiry among aviation insurance carriers, and examination of standard clauses in their insurance policies, readily discloses that such insurance coverage can be arranged on payment of the appropriate premium.¹⁰⁰ Premiums to cover the insurance of such risks can

⁹⁸See notes 27 and 28 *supra*.

⁹⁹*Petro v. Ohio Casualty Insurance Co.*, 95 F.Supp. 59 (S.D. Cal. 1951).

¹⁰⁰I include here a purely personal account regarding insurance coverage for the operations of aviation flying schools. I include this for the information of whom it may concern, because I have been unable to find available published material covering these details.

My inquiries among aviation insurance underwriters have indicated to me that insurance provisions covering aviation are not officially standardized as they largely are in the case of fire and general casualty policies. The provisions of various blank forms of aviation insurance policies that I have examined indicate that the insurer is apt to exclude from coverage any liability relating to flying school and student pilot activity unless such coverage is specifically included and the additional premium for the added risk is charged. Aviation underwriters evidently regard flying school activity as more risky than ordinary air traffic of the business or pleasure type, though, perhaps, less risky than the carrying of passengers for hire.

Coverage for flying school activity, if included, however, can cover planes "owned, and not owned." It seems to be well known among aviation underwriters that flying school operators from time to time rent or borrow planes from each other or from others not in the flying school business as well as using their own in connection with the training of student pilots.

Incidentally, conversations with agents for aviation insurance underwriters have informed me of another significant fact. This is that losses paid by insurers for damage resulting from crashes or forced landings on persons or property outside of established landing areas are a relatively minor

be carried as overhead costs of operations, and distributed like other operating costs in the form of charges to its customers. The immediate customers are, of course, the group of student pilots themselves and such others as on their behalf supply funds for their instruction.¹⁰¹

Appropriate here, too, is the recent judicial utterance of the late Justice Rutledge on a closely analogous situation involving insurability of the risks as bearing on the justice under the circumstances of applying strict liability. He was speaking of the strict liability under the doctrine of respondeat superior of charitable hospitals for the torts of their servants or agents. "What is at stake, . . . is the cost of reasonable protection, the amount of the insurance premiums as an added burden on its finances, not the awarding over in damages of its entire assets."¹⁰²

Unless strict liability for forced landings and crashes occurring in the course of the school's solo flight training operations is applied to the operator of the flying school, as well as to the pilot personally, the financial irresponsibility of very many youthful pilots will leave the injured victim in many school-created forced landings with no effective practical remedy.¹⁰³ The *res ipsa loquitur* inference of negligence is subject to rebuttal. Proof of negligence against the flying school operator may be wholly lacking. The flying school operator of this extrahazardous activity, that created the risk and did the damage, would be left to reap the benefits while leaving its passive, innocent victim to bear the loss.

Here, obviously, is presented a situation where the activity which created the risk and caused the damage was wholly one-sided, extrahazardous and insurable. If strict liability were not here applied, this would be a flagrant

item in the total of losses actually experienced. The heaviest losses paid by insurers apparently are concerned with injuries to passengers. Losses due to crashes or forced landings on persons or property outside of established landing areas happen relatively rarely. This confirms, in that regard, the statement of Mr. Schnader on this point which is reported in note 43, *supra*. Such losses are often settled for when they occur without raising any question over what may be the technical basis for liability.

So far as aviation insurance is concerned, therefore, and so far as aviation is concerned, it would seem that the amounts required to carry insurance coverage for losses of this type based upon strict liability for such losses will not put air traffic out of business. On the contrary, it will require the distribution by the aviation industry of the burden of such losses, in the form of charges for overhead costs, to its customers who get its benefits, instead of throwing such losses on the luckless victim on the ground below, who created no danger to them and who got no direct benefits.

¹⁰¹ . . . The risk could be covered by insurance and a student pilot could be required to pay the cost of an insurance policy covering the additional . . . risk." Russell, *supra* note 78 at 271. In this part of the article its author was speaking of the supposed advantages of having a statute imposing strict liability upon the flying school and requiring insurance coverage in order to avoid uncertainty over this matter, and make flying schools more careful, and spread the cost of carrying this protection among the people benefited by the use of the flying service.

¹⁰² Rutledge, J., *supra* note 29.

¹⁰³ See notes 95 and 96 *supra*.

"If a student-pilot crashes into a house, in many cases he will be killed; in many cases he will be financially irresponsible . . . If, as previously stated, the pilot is financially irresponsible, the remedy of the householder would be illusory." Russell, *supra* note 78, at 271.

instance of permitting the party who carried on such an activity to create the risks and reap the benefits while throwing the loss upon his passive, innocent victim.¹⁰⁴

3. The California Superior Court Held That the Flying School Operator Who Sent Plane Aloft in Student Pilot Solo Flight Training Was Subject to Strict Liability to Ground Victims Outside of Established Landing Areas.

The California Superior Court, the trial court, denied the defendant flying school operator's motion for nonsuit in an action brought by the owner of the house on which a plane operated by his student pilot in solo flight training had crashed. On the basis for liability of the operator of the flying school, the court in its ruling stated as follows:

"I might state also, that my views as to the liability of Defendant, Lenerville, are governed, in my opinion, by the rule as stated in the Restatement of Torts, Secs. 519 and 520. . . . And it seems to me that the rule in the Restatement of Torts should control; it appears to me to be a reasonable rule, and particularly in the light of the statute that we do have, in which the Legislature apparently has distinguished the liability of aircraft owners and operators with respect to the owners of other aircraft, as distinguished from the liability of the owner or lessee or operator of an aircraft that does damage to some stranger's property, so to speak, that has no bearing upon aviation as we have in the case here."¹⁰⁵

¹⁰⁴It may be emphasized in this connection that the victims of crashes and forced landings of airplanes have no spokesman before the groups or bodies where policies are planned, risks are appraised and executive decisions are made. The victims of crashes and forced landings likewise have no spokesman before the groups or bodies where legislative proposals are formulated, or where publicity releases are formulated on this matter for influencing public opinion.

The individual victim of crashes and forced landings is not identified in advance. He becomes identified when the disaster occurs and not before.

The next victim is equally unidentified and unconscious of immediate danger to him personally until disaster strikes him. Any systematic analysis or compilation of materials for courts to scrutinize that can adequately present the victim's side of this problem, or that can in this regard adequately answer the barrage of systematic propaganda emanating from the aviation industry, must necessarily be a sacrificial labor of love. Since all of us are exposed as potential victims of crashes and forced landings outside of established landing areas, he who in this regard champions the victim's cause is in fact the unheralded and uncompensated champion of the public.

"So far as I am aware, the victims of aircraft accidents and their attorneys have not been questioned by any government agency or by any bar association committee or research organization." Sweeney, note 54 *supra*, at 337.

¹⁰⁵Boyd v. White, *supra* note 79.